

Ismail bin Mansor & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
R-06A-01-10 OF 2012

BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
31 OCTOBER 2014

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Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking in 6,705g of cannabis — Conviction and sentence — Appeal against — Whether adverse inference should have been invoked against prosecution for failure to call informer and introducer — Whether failure to prove knowledge of drugs — Whether knowledge or intention can be inferred from proved facts and surrounding circumstances — Whether failure to prove common intention — Whether failure to prove trafficking — Whether failure to appreciate defence case amounted to miscarriage of justice warranting appellate intervention — Whether conviction safe

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Criminal Law — Penal Code — s 34 — Common intention — Whether common intention may be inferred from surrounding circumstances — Drug trafficking charge — Both appellants carrying the drugs to be delivered to purchaser — Whether absence of specific finding on common intention fatal to prosecution's case

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Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Drug trafficking charge — Whether adverse inference should have been invoked against prosecution for failure to call informer and introducer — Whether a crucial or material witness

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On 27 April 2011, the agent provocateur ('SP5') met with an informer who then brought SP5 to meet with one Ravi. Upon SP5's request, Ravi contacted the second respondent whom Ravi referred to as his boss. All three of them then met the second appellant. SP5 and the second appellant discussed the supply of drugs and the second appellant agreed to supply cannabis to SP5. On the same day, SP5 and the informer went to a cement plant. The second appellant came in a car driven by the first appellant. The second appellant then asked the first appellant to take SP5 to the car where the first appellant showed SP5 the cannabis which was kept in a box placed at the footrest of the front passenger seat. Upon SP5 giving the prearranged signal, the raiding party arrested the appellants. The appellants were charged for trafficking in 6,705g of cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') read with s 34 of the Penal Code. The appellant's defence was that they

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- A had been framed by Ravi. The defence contended that Ravi had an axe to grind against the second appellant relating to some reward money which was not paid. The learned judicial commissioner ('the JC') found that the defence failed to raise a reasonable doubt and thus convicted and sentenced the appellants to death. The appellants brought this appeal on the following grounds: (i) that
- B due to the failure to call Ravi and the informer, the judge should have invoked s 114(g) of the Evidence Act 1950 against the prosecution; (ii) that knowledge of the first appellant was not proven as there was no clear evidence that the first appellant knew of the contents of the box; (iii) that no common intention was proven due to the absence of any finding by the JC as to common intention and
- C the absence of any discussion or consideration by the JC on the evidence or circumstances or conduct of the appellants that constituted common intention; (iv) that there was no evidence of trafficking; and (v) that the JC had failed to appreciate the defence case.
- D **Held**, dismissing the appeal and affirming the conviction and sentence:
- (1) Ravi's role was essentially to introduce SP5 to the second appellant. Apart from being present during the first meeting at the petrol kiosk, there was no evidence to show that Ravi or the informer were involved or had
- E participated in the negotiation between SP5 and the second appellant on the price of the drugs. If indeed the appellants had been framed by Ravi, which was a very serious matter, the appellants should have lodged a report with the authorities. However, nothing was done by the appellants to clear their name as far as Ravi was concerned. This affected the weight and credibility of their defence. Even assuming that the defence version was true, it did not detract from the fact that it was the second appellant who had negotiated on the sale of the drugs with SP5. Hence, Ravi was not a crucial or material witness for the prosecution. Ravi was also not a
- F material witness to rebut or to negate the defence. Thus, there was no merit on the issue of s 114(g) raised by the appellants (see paras 22, 24 & 26).
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- (2) In order to prove possession, the prosecution must prove that the first appellant had first, the physical control over the drugs and second, knowledge of the existence of the drugs; namely the physical and the mental elements. Knowledge or intention as the mental element can be proved by inference from proved facts and the surrounding circumstances. In drawing inferences from proved facts, the court is entitled to infer knowledge on the part of a person on the assumption that such a person has the ordinary understanding expected of him. The court is not concerned with the knowledge of a reasonable man but with reasonable inferences from which knowledge can be inferred (see para 28).
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- (3) The prosecution's case against the appellants was premised on a negotiated sale where the prosecution need not necessarily rely on the conventional approach of having to prove mens rea possession before resorting to the presumption under s 37(da) of the DDA. The evidence of SP5 pointed to the direct selling of the drugs by the second appellant to SP5. On the night in question, at the cement plant, the second appellant together with the first appellant were in the process of effecting the sale by carrying the drugs in the first appellant's car. Looking at the whole circumstances of the case, the JC did not err in finding that the first appellant had knowledge of the proscribed drugs found in his car (see paras 29 & 37). A B C
- (4) The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case. While there was no specific finding by the JC on common intention, the omission of the JC in the circumstances of this case was not fatal. From the evidence, both the appellants had possession of the drugs and both had carried the drugs to the cement plant to be delivered to SP5 pursuant to the earlier discussion between SP5 and the second appellant (see paras 39 & 41). D
- (5) The defence that the box containing the drugs belonged to Ravi was put to the prosecution witnesses. In this respect, the JC erred in his finding that the defence was an afterthought. However, the error in itself did not warrant an appellate intervention nor did it render the conviction of the appellants unsafe. Looking at the whole circumstances of this case, no miscarriage of justice had been occasioned to the appellants. Despite the imperfections in the grounds of judgment, the JC had considered the defence as regards the role of Ravi vis a vis the box. The defence had failed to raise a reasonable doubt on the prosecution's case. On the totality of the evidence, the conviction was safe (see paras 43–44 & 48). E F

[Bahasa Malaysia summary G

Pada 27 April 2011, ejen perangkap ('SP5') berjumpa dengan pemberi maklumat yang kemudiannya telah membawa SP5 berjumpa dengan Ravi. Atas permintaan SP5, Ravi telah menghubungi responden kedua yang mana Ravi telah merujuk sebagai ketuanya. Ketiga-tiga mereka kemudiannya telah berjumpa perayu kedua. SP5 dan perayu kedua telah berbincang tentang bekalan dadah dan perayu kedua bersetuju untuk membekalkan kanabis kepada SP5. Pada hari yang sama, SP5 dan pemberi maklumat telah pergi ke kilang simen. Perayu kedua telah datang dengan kereta yang dipandu oleh perayu pertama. Perayu kedua kemudian meminta perayu pertama untuk membawa SP5 ke kereta itu di mana perayu pertama menunjukkan kepada SP5 kanabis yang disimpan di dalam kotak yang diletakkan di tempat kaki di tempat duduk penumpang hadapan. Setelah SP5 memberikan isyarat yang telah diatur sebelumnya, pihak serbuan telah menangkap perayu-perayu. H I

- A Perayu-perayu telah dituduh mengedar kanabis seberat 6,705g, satu kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 34 Kanun Keseksaan. Pembelaan perayu adalah bahawa mereka telah diperangkap oleh Ravi. Pembelaan berhujah bahawa Ravi mempunyai sebab untuk berbuat demikian terhadap perayu kedua berkaitan wang ganjaran yang tidak dibayar. Pesuruhjaya kehakiman yang bijaksana ('PK') mendapati pembelaan telah gagal menimbulkan keraguan yang munasabah dan oleh itu mensabit dan menjatuhkan hukuman mati ke atas perayu-perayu. Perayu-perayu telah memulakan rayuan ini atas alasan-alasan berikut: (i) bahawa akibat kegagalan untuk memanggil Ravi dan pemberi maklumat, hakim hendaklah menggunakan s 114(g) Akta Keterangan 1950 terhadap pendakwaan; (ii) bahawa pengetahuan perayu pertama tidak dibuktikan kerana tiada keterangan jelas bahawa perayu pertama mengetahui tentang kandungan kotak itu; (iii) bahawa tiada niat bersama telah dibuktikan akibat ketiadaan apa-apa penemuan oleh PK itu berhubung niat bersama dan ketiadaan apa-apa perbincangan atau pertimbangan oleh PK itu berdasarkan keterangan atau keadaan atau tingkah laku perayu-perayu yang membentuk niat bersama; (iv) bahawa tiada keterangan tentang pengedaran; dan (v) bahawa PK telah gagal memahami kes pembelaan.
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- E **Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:
- (1) Peranan Ravi adalah penting untuk memperkenalkan SP5 kepada perayu kedua. Selain daripada hadir semasa perjumpaan pertama di stesen petrol, tiada keterangan menunjukkan bahawa Ravi atau pemberi maklumat terlibat atau telah menyertai dalam rundingan antara SP5 dan perayu kedua berhubung harga dadah itu. Jika memang perayu-perayu telah diperangkap oleh Ravi, yang merupakan perkara serius, perayu-perayu hendaklah membuat laporan dengan pihak berkuasa. Walau bagaimanapun, tiada apa yang dilakukan untuk membersihkan nama mereka setakat mana Ravi adalah berkaitan. Ini menjejaskan beban dan kebolehpercayaan pembelaan mereka. Walaupun dengan andaian bahawa versi pembelaan adalah benar, ia tidak menyimpang daripada fakta bahawa ia adalah perayu kedua yang berunding tentang jualan dadah itu dengan SP5. Justeru, Ravi bukan saksi penting untuk pendakwaan. Ravi juga bukan saksi penting untuk mematah atau menyangkal pembelaan. Oleh itu, tiada merit berhubung isu s 114(g) ditimbulkan oleh perayu-perayu (lihat perenggan 22, 24 & 26).
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- I (2) Bagi tujuan membuktikan milikan, pendakwaan hendaklah membuktikan bahawa perayu pertama mempunyai pertamanya, kawalan fizikal ke atas dadah itu dan keduanya, pengetahuan tentang kewujudan dadah itu; iaitu elemen-elemen fizikal dan mental. Pengetahuan atau niat sebagai elemen mental boleh dibuktikan melalui inferens daripada fakta yang dibuktikan dan keadaan sekeliling. Dalam membuat inferens daripada fakta yang dibuktikan, mahkamah berhak

- untuk membuat kesimpulan tentang pengetahuan di pihak seseorang itu atas andaian bahawa orang itu mempunyai pemahaman biasa yang diharapkan daripadanya. Mahkamah tidak mengambil berat tentang pengetahuan seorang yang munasabah tetapi dengan inferens yang munasabah daripada mana pengetahuan itu boleh disimpulkan (lihat perenggan 28). A
- (3) Kes pendakwaan terhadap perayu-perayu adalah berdasarkan rundingan jualan yang mana pendakwaan tidak perlu bergantung kepada pendekatan konvensional yang memerlukan bukti milikan mens rea sebelum beralih kepada andaian di bawah s 37(da) ADB. Keterangan SP5 menunjukkan kepada jualan terus dadah itu oleh perayu kedua kepada SP5. Pada malam yang dipersoalkan, di kilang simen itu, perayu kedua bersama dengan perayu pertama dalam proses membuat jualan dengan membawa dadah itu ke dalam kereta perayu pertama. Berdasarkan keseluruhan keadaan kes, PK tidak terkhilaf dalam membuat penemuan bahawa perayu pertama mempunyai pengetahuan tentang dadah yang diharamkan itu yang ditemui di dalam keretanya (lihat perenggan 29 & 37). B
- (4) Kewujudan niat bersama adalah persoalan fakta dan dalam setiap kes ia boleh dibuktikan sebagai perkara berhubung inferens daripada keadaan kes. Pada masa tiada penemuan spesifik oleh PK tentang niat bersama, peninggalan PK dalam keadaan kes ini tidak menjejaskan. Berdasarkan keterangan, kedua-dua perayu mempunyai milikan terhadap dadah itu dan kedua-duanya membawa dadah itu ke kilang simen untuk dihantar kepada SP5 berikutan perbincangan sebelum itu antara SP5 dan perayu kedua (lihat perenggan 39 & 41). C
- (5) Pembelaan bahawa kotak itu mengandungi dadah milik Ravi telah dikemukakan kepada saksi-saksi pendakwaan. Berkenaan ini, PK terkhilaf dalam penemuannya bahawa pembelaan itu suatu yang telah difikirkan kemudian. Walau bagaimanapun, kekhilafan itu sendiri tidak mewajarkan campur tangan pihak rayuan dan tidak menyebabkan sabitan perayu-perayu tidak selamat. Berdasarkan keadaan kes ini, tiada salah laksana keadilan telah disebabkan kepada perayu-perayu. Meskipun alasan penghakiman tidak sempurna, PK itu telah mengambil kira pembelaan berhubung peranan Ravi dengan kotak itu. Pembelaan telah gagal menimbulkan keraguan munasabah atas kes pendakwaan. Berdasarkan keseluruhan keterangan, sabitan itu adalah selamat (lihat perenggan 43–44 & 48).] D
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Notes

For a case on adverse inference under s 114(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

- A For cases on s 34 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2107–2135.
For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

B Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Koh Tiong Hock v PP [2011] 4 MLJ 40; [2011] 2 CLJ 377, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

D Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(2)
Evidence Act 1950 s 114(g)
Penal Code s 34

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Appeal from: Criminal Trial No 46A-01-09 of 2011 (High Court, Kangar)

Amer Hamzah Arshad (Nizam, Amer & Sharizad) for the first appellant.
Hisham Teh Poh Teik (Teh Poh Teik) for the second appellant.

- F *Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Tengku Maimun JCA (delivering judgment of the court):

- G [1] The first appellant and the second appellant were charged in the High Court at Kangar (the first accused and the second accused respectively) for trafficking in dangerous drugs, to wit, 6,705g cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code.
- H [2] Briefly, the case for the prosecution is as follows. On 27 April 2011, the agent provocateur ('SP5') met with an informer at Kuala Perlis where the informer then brought SP5 to meet with one Ravi. The informer introduced SP5 to Ravi. SP5 introduced himself as 'Onn' to Ravi and inquired about the drug transaction. Ravi replied 'Saya akan berhubong bos saya'.
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[3] Ravi contacted his boss and then all three went to the Shell petrol kiosk. At the petrol kiosk, SP5 met the second appellant who was introduced by Ravi as his boss. SP5 and the second appellant discussed the supply of drugs. The

second appellant agreed to supply cannabis to SP5.

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[4] On the same day at about 8.30pm, SP5 and the informer went to the canteen of the cement plant at Bukit Keteri to wait for the second appellant. At about 9.30pm the second appellant came in a Honda Accord PDB 2255 (P2), driven by the first appellant. Both the appellants got down from the car and met SP5 at the canteen. SP5 asked the second appellant about the cannabis. The second appellant then asked the first appellant to bring SP5 to the car. The first appellant and SP5 both got inside the car. The first appellant was at the driver's seat while SP5 was at the front passenger seat.

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[5] The first appellant informed SP5 that the 'barang' was in the box (P3C) which was at the footrest of the front passenger seat. SP5 opened the box and he saw slabs of vegetable material suspected to be cannabis. SP5 got out of the car and gave the prearranged signal for the raiding party to strike. Both the appellants were arrested. The chemist ('SP3') confirmed that the materials were cannabis weighing 6,705g.

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[6] At the end of the prosecution's case, the learned judicial commissioner found that the prosecution had made out a *prima facie* case against the appellants. The finding of the learned judicial commissioner, *inter alia*, is as follows:

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[14] Pertuduhan ke atas kedua-dua OKT telah 'invoked' s 34 Kanun Keseksaan. Dengan yang demikian pihak pendakwa juga perlu membuktikan niat bersama kedua-dua OKT di dalam melakukan kesalahan tersebut. Niat bersama ini mempunyai dua inti pati penting iaitu rancangan awal yang dirancang (*prearranged plan*) di antara kedua-dua OKT untuk melakukan kesalahan berkaitan dan perbuatan kedua-duanya atau salah seorang dari kedua OKT untuk melakukan kesalahan di bawah s 39B(1)(a) dibuat bagi mencapai niat bersama mereka tersebut.

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[18] Keterangan SP4 menunjukkan kedua-dua OKT ditangkap di tempat kejadian dengan P2 dan berikutan tangkapan tersebut dadah jenis *cannabis* dijumpai di dalam kereta tersebut. Keterangan SP5 pula menunjukkan OKT2 telah berbincang dengan beliau tentang transaksi jual beli dadah berbahaya jenis *cannabis* dan selepas perbincangan tersebut OKT2 bersetuju untuk menyerahkan dadah berbahaya *cannabis* tersebut di kawasan parking, kilang simen di Bukit Keteri. Keterangan SP5 juga jelas menunjukkan OKT2 diperkenalkan kepadanya oleh seorang yang bernama Ravi. Ravi ini pula telah diperkenalkan oleh sumber. Sumber pula telah diperkenalkan kepada SP5 oleh SP8. Keterangan SP6 pula menyokong SP4 yang melihat kedua-dua OKT datang ke tempat kejadian pada malam tersebut menaiki kereta P2 dan kedua-duanya telah berjumpa dengan SP5. Kedua-dua OKT kemudian telah ditangkap selepas diserbu oleh pasukan SP4 setelah mendapat isyarat dari SP5 tentang terdapatnya di dalam kereta tersebut.

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[7] The appellants were called upon to enter their defence. Both the appellants gave evidence on oath. Having heard the defence, the learned trial

A judge found that:

B [23] ... Secara asasnya pembelaan kedua-dua OKT ialah kotak yang mengandungi dadah berbahaya yang telah mereka bawa ke tempat kejadian kepunyaan Ravi, yang dikatakan oleh kedua-dua OKT sebagai infoma (pemberi maklumat) Kastam yang dilantik oleh OKT pertama (sic). Pada malam itu Ravi telah datang berjumpa OKT2 di rumah OKT2 dengan cerita untuk memperkenalkan infoma baru kepada OKT2. Di dalam pembelaannya OKT2 juga mengatakan Ravi memberitahu beliau infoma baru tersebut berjanji akan berjumpa mereka di kilang simen Bukit Keteri; tempat kejadian.

C [24] OKT2 kemudian meminta tolong OKT1 untuk pergi bersama beliau ke tempat kejadian, menaiki kereta OKT1 (P2), kerana OKT2 tidak tahu memandu kereta. OKT1 sanggup membantu membawa OKT2 dan Ravi ke tempat kejadian.

D [25] Mereka bertolak dari rumah OKT1 di perumahan Kastam Kuala Perlis. Ravi juga turut bersama di dalam kereta OKT1 ke tempat kejadian. Pada masa itu Ravi membawa satu kotak. Menurut mereka Ravi mengatakan kotak tersebut akan diserahkan kepada kawan beliau dikatakan berminat menjadi infoma Kastam. Kawan Ravi ini akan berada di tempat kejadian dan akan diperkenalkan kepada OKT2.

E [26] Di dalam perjalanan ke tempat kejadian, ketika sampai di Kangar Ravi turun dari kereta OKT1. Ravi memberitahu untuk pergi ke tempat kejadian dan memberitahu OKT1 dan OKT2 dia akan pergi ke tempat kejadian kemudian. Semasa turun dari kereta tersebut Ravi telah tinggalkan kotak tersebut di dalam kereta. Mereka diminta menyerahkan kotak tersebut kepada kawan Ravi yang menunggu di tempat kejadian.

F [27] Berdasarkan keterangan kedua-dua OKT ini, pembelaan kedua-dua OKT secara asasnya ialah mereka tidak mempunyai pengetahuan tentang kandungan kotak tersebut sebagai dadah berbahaya. ...

G [28] Pembelaan kedua-dua OKT ini juga menunjukkan mereka telah diperangkap oleh seorang bernama Ravi untuk membawa dadah berbahaya tersebut kepada SP5. Ravi dikatakan telah memerangkap mereka atas sebab tertentu. Perkara ini telah ditimbulkan di dalam keterangan pembelaan OKT. ...

At para 30 of the grounds of judgment (p 1510: *rekod rayuan Jld 8*), the learned judicial commissioner said:

H ... saya dapati keterangan pembelaan OKT seperti diringkaskan di atas adalah pembelaan yang sengaja diada-adakan bagi melepaskan diri dari pertuduhan ini. Walaupun watak Ravi wujud namun saya dapati peranan Ravi seperti yang dikatakan pembelaan adalah peranan yang sengaja diwujudkan untuk menafikan kes pendakwaan sebelum ini. Pembelaan ini merupakan satu pembelaan yang difikirkan kemudian.

I [8] The learned trial judge found that the defence has failed to raise a reasonable doubt on the prosecution's case. The appellants were thus convicted and sentenced to death, hence the appeal.

THE APPEAL

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[9] Encik Amer Hamzah bin Arshad, learned counsel for the first appellant and Encik Hisyam Teh Poh Teik, learned counsel for the second appellant canvassed four issues and two issues, respectively. As some of the issues are overlapping, we will consider them together. The issues are:

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- (a) failure to call Ravi;
- (b) knowledge of the first appellant not proven;
- (c) no common intention;
- (d) no evidence of trafficking; and
- (e) failure to appreciate the defence case.

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Failure to call Ravi

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[10] Apart from the issue of Ravi, learned counsel for the first appellant had also submitted that the informer ought to be called. The informer, submitted learned counsel, had crossed the line of an informer as he had played an active role. The informer was not only present during the discussion but was also present at the cement plant.

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[11] Learned counsel for the first appellant further submitted that the evidence of the prosecution revealed that Ravi was crucial in the entire operation. It was Ravi who had contacted the second appellant to come to the meeting. As such, what prompted and caused the second appellant to come to the said meeting on the afternoon of 27 April 2011 remains a mystery, unless Ravi was called as a witness.

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[12] For the second appellant, it was submitted that as the prosecution has failed to call, or at the very least, offer Ravi to the defence, a prima facie case has not been proven against the appellants and that the learned judicial commissioner had committed serious errors of law in failing to invoke s 114(g) of the Evidence Act 1950 against the prosecution.

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Knowledge of the first appellant not proven

[13] Learned counsel for the first appellant submitted that the prosecution had failed to prove the element of knowledge against the first appellant for the following reasons:

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- (a) the first appellant was never involved in any prior discussion or meeting with SP5 or Ravi;

- A (b) the first appellant had no dealing with Ravi who had played a pivotal role in arranging the meeting with SP5 on the afternoon of 27 April 2011;
- B (c) the first appellant went to the cement plant to send the second appellant as the second appellant could not drive. The first appellant did not go to the cement plant to participate in a drug trafficking activity;
- (d) the learned judicial commissioner had failed to exclude the possibility that Ravi could have brought the box containing the drugs;
- C (e) there was no evidence that the first appellant had brought the package into the car or who had handled the box;
- (f) there was no evidence of conduct consistent with guilt; and
- (g) there was no evidence that the first appellant knew the contents of the box.
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[14] The following facts ie that the first appellant had gone to the cement plant together with the second appellant in the first appellant's car; that the first appellant had met SP5 with the second appellant at the cement plant; and that the first appellant was arrested when he was getting out from the car, submitted learned counsel, were insufficient to attract the inference that the first appellant had knowledge of the drugs.

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No common intention

F [15] The complaint on this issue was that the learned judicial commissioner did not make a finding as to the specific act of the first appellant which was relied on to fasten criminal liability under s 34 of the Penal Code. It was submitted by learned counsel for the first appellant that the mere fact that the first appellant was the driver of the car and had gone to and was seen together with the second appellant at the cement plant that night without any other evidence of actual discussion or participation in the act of trafficking was not sufficient to constitute the element of common intention.

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H [16] As such it was submitted that there was no common intention between the appellants and that the fact that both the appellants had agreed to go to the cement plant together that night, at best, merely indicated that they had similar intention of going to the said location but not common intention of trafficking in dangerous drugs.

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No evidence of trafficking

[17] This issue overlaps with the issue of Ravi, the issue of possession and the evaluation of defence. It was the submission of learned counsel for the first

appellant that the element of intention to traffic in drugs was not proven beyond reasonable doubt for the following reasons: A

- (a) the first appellant was not involved in any discussion or meeting on the afternoon of 27 April 2011;
- (b) the appellant made it clear that he had no knowledge of the drugs and that his role was merely to accompany the first appellant to the cement plant to meet an informer as the second appellant does not know how to drive; and B
- (c) the learned judicial commissioner also failed to consider the role played by Ravi from the appellant's perspective. C

No appreciation of the defence

[18] Learned counsel for the second appellant submitted that the learned judicial commissioner did not give a fair and just assessment of the defence case and that His Lordship erred when he described the defence as an afterthought. In this regard, learned counsel for the second appellant submitted that an afterthought defence has no credibility and it is open to suggestion that it is concocted and to that extent the defence of both the appellants were prejudiced. D E

Whether Ravi is a material witness

[19] The defence in a nutshell is that the appellants had been framed by Ravi. The common complaint by learned counsel for both the appellants was on the failure of the learned judicial commissioner to consider and to invoke s 114(g) of the Evidence Act 1950 against the prosecution. F

[20] On the issue of the informer, Ravi and of s 114(g), it is pertinent to examine the role of Ravi and the informer. The relevant evidence of SP5 is as follows (pp 65–67: *rekod rayuan Jld 1*): G

Sampai di Kuala Perlis jumpa sumber. Sumber bawa saya jumpa lelaki India yang tunggu di tepi jalan di bahagian taxi stand di Kuala Perlis. H

Lelaki India itu Ravi ...

Saya tanya Ravi bagaimana dengan urusan kita. Ravi beritahu 'saya akan berhubung bos saya'.

Urusan tersebut berkenaan dengan jual beli ganja. I

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Ravi berhubung dengan bos. Ravi kata orang itu nak jumpa bos-berhubung dengan barang.

Ravi arahan saya pergi ke shell di jalan menuju ke Feri Kuala Perlis.

- A** Ravi beritahu bos akan datang ke shell dalam beberapa minit. Dia nak bertemu dengan saya.
Saya pergi ke sana bersama sumber dan Ravi.
- B** Lebih kurang 3.00 petang datang satu lelaki Melayu naiki motosikal menuju ke Ravi. Kami bertiga.
Ravi kenalkan 'Ini bos saya.'
Saya kenalkan diri saya — Onn
Bos tanya 'awak datang dari mana'. Saya beritahu saya kerja pemandu lori simen.
- C** Saya tanyakan barang maksud 1 kilo ganja dengan harga berapa. Bos beritahu kalau ambil satu ketul ganja dengan harga RM200.00/.
Saya minta kurangkan harga. Bos beritahu harga paling murah. Saya tanya kalau ambil banyak boleh kurang/tidak harga. Nanti saya akan berhubung dengan bos.
Bos beritahu kalau ambil barang banyak dia akan bagi RM1800/=.
- D** Setelah setuju untuk berhubung balik saya tanya macamana mahu berhubung. Dia bagi nombor telefon 0195609284.
Bos kata kalau jadi call balik bos.
- E** [21] On the meeting with the second appellant at the cement plant, SP5 gave the following evidence (p 69: *rekod rayuan Jld 1*):
Saya bersama sumber. Saya order air. Selepas itu saya contact OKT guna nombor telefon 0195609284. Saya tanya OKT 2 macamana dengan urusan. OKT 2 beritahu ambil di mana.
- F** Saya sedang tunggu di kantin kilang simen. Kalau boleh 7 ketul dadah jenis ganja. Duit telah disediakan.
OKT 2 beritahu tempat itu terlalu jauh. Saya beritahu saya lebihkan wang untuk wang minyak sampai ke kilang.
- G** OKT 2 beritahu tunggu di sana — saya akan sampai.
Seterusnya jam lebih kurang 9.30 bos telefon — ... Saya beritahu ada di kantin.
- H** [22] From the above, we find that the role of Ravi was essentially to introduce SP5 to the second appellant. No doubt, it was Ravi who had contacted the second appellant to come to Shell petrol kiosk, but the fact remains that the presence of the second appellant at the petrol kiosk is consistent with the evidence of SP5 (p 66: *rekod rayuan Jld 1*) that '... Ravi beritahu bos akan datang ke shell dalam beberapa minit. Dia nak bertemu dengan saya'. Apart from being present during the first meeting at the Shell petrol kiosk, there was no evidence to show that Ravi or the informer (who was also present at the second meeting place ie the cement plant) was involved or had participated in the negotiation between SP5 and the second appellant on the price of the drugs.
- I**

[23] The defence contended that Ravi had an axe to grind against the second appellant relating to some reward money which was not paid and that Ravi's testimony is important to reveal the communication that had taken place between him and the second appellant.

[24] As submitted by the learned deputy public prosecutor ('the DPP'), if indeed the appellants had been framed by Ravi, which is a very serious matter, the appellants should and could have lodged a report with the authorities. However, nothing was done by the appellants to clear their name as far as Ravi is concerned. This affects the weight and credibility of their defence. Even assuming that the defence version is true, it does not detract from the fact that it was the second appellant who had negotiated on the sale of the drugs with SP5.

[25] In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, Chong Siew Fai CJ (Sabah and Sarawak) said at p 579:

In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), Mohd Azmi SCJ (now FCJ) in delivering the judgment of the court, opined (at p 494) that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case'. In our instant case under appeal though Cholar introduced PW9 to the second respondent and was present when both transactions involving cannabis was struck, there was no evidence that he had done anything apart from being present. It appears obvious that his presence during the negotiation process and the transaction was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. In *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

...

Much had been canvassed before us respecting the drawing of adverse inference under s 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. ...

In our instant case under appeal, there can be no doubt that the basis of the prosecution's case to substantiate the charge was on the sale of the cannabis resulting from the negotiation. There is ample evidence of direct negotiation between PW9 and the first respondent, and the carrying of the cannabis from room 'K' by the second respondent at the behest of the first respondent. On that basis, and given the roles played by Cholar and Amran as reflected from the evidence adduced, it is difficult to see how the two of them can be material to the point in issue, ie sale through negotiation. Furthermore, the materials on record do not in any way

A suggest that the prosecution had withheld them with ulterior motives. We do not think any adverse inference should be drawn against the prosecution for the non-production of them

B [26] Similarly in our case, we are of the view that Ravi is not a crucial or material witness for the prosecution. In the context of the defence case, for the reasons that will follow on the issue of possession, we are similarly of the view that Ravi is not a material witness to rebut or to negate the defence. There was no element of mystery in the conversation between Ravi and the second appellant given the second appellant's own evidence that the purpose of meeting SP5 was to meet a potential informer. We therefore find no merit on the issue of s 114(g) raised by the appellants.

Whether the first appellant had knowledge of the drugs

D [27] Learned counsel had submitted that there was no clear evidence that the first appellant knew of the contents of the box and that the first appellant was indirectly implicated by virtue of being at the wrong place at the wrong time.

E [28] It is trite that in order to prove possession, the prosecution must prove that the first appellant had first, the physical control over the drugs and second, knowledge of the existence of the drugs; namely the physical and the mental elements, respectively (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237). The law is clear and well settled that knowledge or intention as the mental element can be proved by inference from proved facts and the surrounding circumstances (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Koh Tiong Hock v Public Prosecutor* [2011] 4 MLJ 40; [2011] 2 CLJ 377). And in drawing inferences from proved facts, the court is entitled to infer knowledge on the part of a person on the assumption that such a person has the ordinary understanding expected of him. The court is not concerned with the knowledge of a reasonable man but with reasonable inferences from which knowledge can be inferred (see *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13).

H [29] Coming back to the present appeal, we must not lose sight of the fact that the prosecution's case against the appellants is premised on a negotiated sale where the prosecution need not necessarily rely on the conventional approach of having to prove mens rea possession before resorting to the presumption under s 37(da) of the Act. The evidence of SP5 which was accepted by the learned judicial commissioner points to the direct selling of the drugs by the second appellant to SP5 and on the night in question, at the cement plant, the second appellant together with the first appellant were in the process of effecting the sale by carrying the drugs in the first appellant's car.

I

[30] The defence version is that Ravi is an informer of the customs; that Ravi had come to the second appellant's house to inform the second appellant that the potential informer (SP5) wanted to meet the second appellant at the cement plant; that Ravi had brought with him a box; that the second appellant together with Ravi then went to the first appellant's house (on a motorcycle) to ask the first appellant to drive them to the cement plant to meet SP5; that Ravi had brought the box into the first appellant's car; that along the way to the cement plant, Ravi got down; that Ravi will go to the cement plant later; that Ravi had left the box in the car and had asked the appellants to take the box to SP5.

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[31] The above version gives rise to the following questions: if the purpose of the meeting at the cement plant was only for the second appellant to meet SP5, why the need to meet again when the second appellant had just met SP5 at the Shell petrol kiosk earlier in the day? If Ravi could have brought the box from the second appellant's house to the first appellant's house on a motorcycle, why the need to have the box sent to SP5 in a car?

D

[32] There was no evidence why Ravi had to get down along the way when the plan was for all three of them to go to the cement plant. If indeed the version that Ravi had wanted to join the two appellants later and in the meantime had wanted the box to be carried by the appellants is true, why the need for Ravi to tag along on the second appellant's motorcycle to the first appellant's house when what Ravi could have done was to let the second appellant have the box to be given to SP5. Given all the above, the defence version as to the role of Ravi insofar as the box is concerned, in our view, is neither probable nor credible. The need to call Ravi to rebut or to negate the defence version does not arise.

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[33] Learned counsel for the first appellant had made reference to the words uttered by the first appellant 'barang ada di tempat letak kaki ...' and submitted that 'barang' could mean anything. Learned counsel for the first appellant had also submitted that another reason why knowledge could not be inferred against the first appellant was because the box was not transparent and because of the inconsistencies between the evidence of the SP4 and SP5 as regards whether the box containing the drugs was closed or opened. SP4 said that he had to open the box while SP5 stated that the box was already opened.

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[34] In our view, the condition of the box is a non-issue. The evidence of the first appellant in cross-examination stated thus (pp 176–177: *rekod rayuan Jld 1*):

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DPP: Saya katakan kamu tahu bahawa ianya adalah ganja sebab daripada bau yang kuat daripada kotak tersebut, itu sebab kamu tahu.

- A OKT1: Tidak setuju Yang Arif sebab masa memandu
...
- B DPP: Okay. Saya katakan kamu tahu sebab kamu ini bertugas di UPP dan ada buat rampasan sampai 700 kilo. Jadi sewajarnya kamu tahu bahawa sesuatu bau itu adalah ganja, adalah sesuatu adalah bau ganja. Betul tak betul?
- OKT1: Okay
- DPP: Kamu dah berkhidmat 17 tahun dah
- C OKT1: Tidak setuju Yang Arif sebab semasa memandu

D [35] The reason given by the first appellant in cross-examination on why he could not have smelled the cannabis in the box and thus have no knowledge of the drugs was not because the box was closed or because the box was not transparent. The reason was because he was driving. The first appellant did clarify though in re-examination (p 185: *rekod rayuan Jld 1*) that 'Semasa memandu Yang Hakim, keadaan tingkap terbuka dan keadaan kotak itu tertutup Yang Arif ... Mungkin saya tidak dapat baulah disebabkan angin masuk melalui tingkap'. We note that it was never suggested to SP4 (who had testified on the smell of cannabis) that the first appellant could not smell the cannabis for whatever reason.

F [36] The first appellant was an experienced customs officer. Insofar as the box is concerned, the court is entitled to infer knowledge of the first appellant on the presumption that he has the ordinary understanding expected of him. It is not expected of him to be innocently carrying the proscribed drugs and not be suspicious of the presence of the box carried by an informer purportedly to be passed on to another informer.

G [37] Looking at the whole circumstances of the case, we find no error on the part of the learned judicial commissioner in his finding that the first appellant had knowledge of the proscribed drugs found in his car.

H Whether there was common intention

I [38] The issue stems from the absence of any finding by the learned judicial commissioner as to common intention and the absence of any discussion or consideration by the learned judicial commissioner on the evidence or circumstances or conduct of the appellants that constituted common intention.

[39] The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see

Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor [2010] 1 MLJ 749; [2010] 1 CLJ 17). A

[40] The evidence of SP5 states that (pp 71–72: *rekod rayuan Jld 1*):

Saya beritahu OKT2 dan 1 untuk order ais di kantin tersebut. Selepas mereka order saya tanyakan 'barang ada tak' maksud permintaan saya — 7 ketul dadah jenis ganja ... Saya tanyakan kepada OKT 2. OKT 2 jawab barang ada di dalam kereta. ... Seterusnya OKT 2 beritahu OKT 1 'hang bawa dia masuk ke kereta Honda Accord.' ... Saya masuk ke kereta. OKT 1 juga masuk ke kereta. Pintu ditutup. Dia beritahu barang di dalam kereta di tempat letak kaki dibalut dalam kotak. ... Saya lihat kotak di bahagian depan. Saya buka. Lihat ada ketulan mampat di dalam. Ini disyaki ganja. B C

[41] While we agree that there was no specific finding made by the learned judicial commissioner on common intention, we are of the view that the omission of the learned judicial commissioner in the circumstances of this case is not fatal. From the evidence, His Lordship was satisfied that both the appellants had possession of the drugs and both had carried the drugs to the cement plant to be delivered to SP5 pursuant to the earlier discussion between SP5 and the second appellant. D E

[42] In our judgment, it is not a mere coincidence that both the appellants were at the cement plant, the meeting place for delivery as agreed between SP5 and the second appellant. Neither was it a mere coincidence that the drugs recovered from the car was consistent with the amount that was agreed between SP5 and the second appellant. In the light of our finding on the issue of possession, we agree with the learned judicial commissioner that the drugs found in the first appellant's car were carried to the cement plant pursuant to the discussion between SP5 and the second appellant for the sale of the drugs. F G

Whether there was proper appreciation of the defence

[43] The defence essentially was that the box containing the drugs belonged to Ravi. This line of defence was put to the prosecution witnesses, and this was acknowledged by the learned judicial commissioner. In this respect, we agree that the learned judicial commissioner had erred in his finding that the defence was an afterthought. H

[44] However, we are of the view that the error in itself does not warrant an appellate intervention nor does it render the conviction of the appellants unsafe. Looking at the whole circumstances of this case, we are of the view that no miscarriage of justice had been occasioned to the appellants. I

A [45] Although the defence of the second appellant was that Ravi had wanted to introduce SP5 as a potential informer and that SP5 had some information concerning drug activities at the cement plant, there was nothing in the evidence of the second appellant to show that he had elicited any information from SP5 or that SP5 had given him any information on the activities of drug at the cement plant. What appears from the evidence of the second appellant B was the conversation between SP5 and the second appellant on the market price of cannabis and on the reduction of the price (pp 203–206 *rekod rayuan Jld 2*). This supports the evidence of SP5 that at the Shell petrol kiosk, he had discussed the price of cannabis with the second appellant (see p 203: *rekod rayuan Jld 2*). C

D [46] As for the defence version that Ravi had informed the second appellant that SP5 wanted to meet the second appellant at the cement plant and that Ravi had asked the appellants to bring the box to SP5, we note the following evidence of the second appellant on the meeting with SP5 at the Shell petrol kiosk (p 206: *rekod rayuan Jld 2*):

E OKT2: Dia tanya berapa saya kata kemungkinan ia bawah daripada 2000, satu ribu lebih boleh dapat satu ribu lapan boleh dapat saya kata.
AMB: Boleh dapat satu ribu lebih dan satu ribu lapan, lepas tu?
OKT2: Lepas tu, Unn cakap okay dia ada kerja ada hal yang dia nak kena buat dia kata.
F ... dia cakap sama saya, kalau ada apa-apa nanti dia akan bagi tahu, kemudian kami bersalam.

G [47] From the second appellant's own testimony, when SP5 and the second appellant parted ways, nothing was mentioned about SP5 informing or contacting the second appellant through Ravi. In fact, the second appellant agreed to the following question posed by the learned DPP (p 242: *rekod rayuan Jld 2*):

H ... sepanjang pertemuan di Kuala Perlis itu, Ravi ini hanya berdiri sahaja di situ, dan tak ada mainkan apa-apa peranan selain memperkenalkan kamu kepada Unn. Setuju tak setuju?.

I [48] To conclude, despite the imperfections in the grounds of judgment, we find that the learned judicial commissioner had considered the defence as regards the role of Ravi vis a vis the box (p 1510: *rekod rayuan Jld 8*) before concluding that the defence was '... sengaja diada-adakan bagi melepaskan diri dari pertuduhan ini'. We agree with the learned judicial commissioner that the defence has failed to raise a reasonable doubt on the prosecution's case. On the totality of the evidence, we are satisfied that the conviction is safe. We therefore unanimously dismissed the appeal of both the appellants and affirmed the

conviction and sentence of the High Court.

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Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum

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